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No. 777

IN THE

Supreme Court of the United States

October Term, 1957

ELMER J. SMALLER, ROBERT L. TAYLOR, and JOHN T. FONTECCHIO,

Petitioners,

vs.

JAMES LEACH, PAUL W. GRIMES, W. RUSSELL OLSON, THOMAS E. FONTECCHIO, and GEORGE BODLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF FOR RESPONDENTS IN OPPOSITION

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JURISDICTION

The date of the judgment and opinion of the Supreme Court of the State of Colorado was October 14, 1957, instead of the 28th day of October 1957, as stated in the Petition.

The date of denial of a petition for rehearing was November 12, 1957.

The Petition fails to state a statutory provision conferring on the Supreme Court of the United States jurisdiction to review the judgment in question by writ

of certiorari. Title 30, Section 23, United States Code, cited by Petitioners, refers to the location of mining claims and not to jurisdiction of the Court.

Furthermore, the Petition shows on its face that The United States Supreme Court does not have jurisdiction to issue the writ. Petitioners cite Title 30, Section 23, United States Code, as the statute which the case involves. This statute provides **inter alia** that a discovery of a vein or lode (mineral) is required for the location of a mining claim. Then Petitioners state that the Supreme Court of Colorado held that a "discovery" was not an issue in the case.

The judgment of the Supreme Court of Colorado follows the case of **Sears v. Collins** (1881), 5 Colo. 492, which upheld the grubstake contract as in the case at bar, even though no "discovery" was present. Thus, the judgment of the state court was based on a non-federal ground under established Colorado law, and the United States Supreme Court has no jurisdiction.

This question of jurisdiction is discussed more fully in the argument in this brief.

QUESTIONS PRESENTED

No federal question is presented. As stated, the Supreme Court of Colorado did not base its judgment on the question of a mineral discovery. Therefore, Petitioners' statement as to the questions presented is erroneous and without foundation.

STATUTE INVOLVED

For the reasons heretofore stated, no federal statute is involved.

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially accurate, except Respondents in the state courts alleged a 60% ownership of the mining claims in question. The trial court found the facts for the Respondents, and adjudged that the Respondents were the owners of a 50% interest in the claims. The Supreme Court of Colorado affirmed the judgment, except it held that the Respondents were entitled to a 60% interest in the claims, that the information furnished by means of a scintillator was a sufficient consideration for the contract, and that whether or not a "discovery" of minerals was made, was immaterial. The validity of the mining claims was not in issue. The question was one of contract.

ARGUMENT

The Supreme Court of Colorado did not base its judgment on a federal question but on the law of contracts set forth in 1881 in the case of **Sears v. Collins** (Supreme Court of Colorado, 1881), 5 Colo. 492. This is shown by the following excerpt from the opinion in the present case (See page 16 of the Petition):

> "The instant case is similar to **Sears v. Collins,** 5 Colo. 492, where this court found for the plaintiff. There the court in the statement of facts said:
>
> > ' * * * in consideration of the information given by Collins (plaintiff) to Sears (defendant) concerning the place where the fragments of ore had been found, Sears agreed to

go there and prospect and search for lodes, and that any and all such as he might find he would locate in the joint names of the two parties, each owning an undivided half, and that Collins (plaintiff) was to pay one-half of the expenses of such location and work in prospecting and developing the finds.'

"Here the information concerning the location of the radiometric anomaly (which is more than float, but which may or may not be wholly within the definition of a mineral discovery under the statutes as defined in **Lindley on Mines,** Third Edition, Vol. 2, p. 777) was sufficient consideration to defendants to bind them to the agreement tendered by Tom. Equity will not permit defendants to later use such consideration solely for their own benefit."

The opinion further states: (See page 21 of Petition):

"With the foregoing in mind we proceed to the determination of this case.

"First, the validity of the mineral discoveries, the legal sufficiency of the locations, and the recordings thereof are not in controversy.

"Second, the agreement in question being how to share locations actually staked (whether subsequent investigation proved the presence of commercial ore) in the area found by Tom with the use of the scintillator we find that it does not then require **'mineral discoveries'** to be first made before the contract could become effective."

Petitioners state that the statute involved is Title 30, Section 23, United States Code, which requires that there be a discovery of mineral within a mining claim before a valid location can be made, and that the question involved "is whether or not an **indication** of minerals can suffice for a discovery." In their Petition they state "The problem of 'discovery' was discussed in some detail by the Colorado Supreme Court in its opinion but held not to be an issue in this case." Thus, by their own statement, Petitioners show that the judgment of the Supreme Court of Colorado was based on a nonfederal ground.

Such has also been the interpretation in the law review. In the "Current Decisions" section of 30 **Rocky Mountain Law Review**, February 1958, page 224, it is stated, in referring to the case now before the Court on petition for certiorari, as follows:

> "Plaintiffs loaned a scintillator to defendants for the purpose of prospecting for uranium. The district court found that in return for the use of the scintillator defendants agreed to a division of anything found by its use. **Held**, there was a valid grubstake agreement binding upon the parties. **By way of dictum**, the court recognized that there was a definite problem in the location of radioactive minerals based on discovery by radiological, geological, and geophysical means and **indicated** that, because of existing federal and state law, **the court would not recognize a location based on this type of discovery.**" (Emphasis supplied)

Petitioners cannot set up a defense based on a federal statute, but which is devoid of merit, and thereby obtain review by the United States Supreme

Court. **Palmer Oil Corporation v. Amerada Petroleum Corporation,** 343 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842; **McCoy v. Shaw,** 275 U. S. 515, 48 S. Ct. 519, 72 L. Ed. 401.

In this case, the judgment of the Supreme Court of Colorado was based on a tenable nonfederal ground which independently and adequately supports the judgment. Therefore, pursuant to Rule 19, and Title 28, Section 1257, United States Code, certiorari should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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